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IN THE

Supreme Court of the United States

October Term, 1966.

No. 274.

HELEN MASCUILLI, Administratrix of the Estate of Albert Mascuilli, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONER'S REPLY BRIEF.

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HELEN MASCUILLI, ADMINISTRATRIX OF THE ESTATE OF ALBERT MASCUILLI, DECEASED,

Petitioner,

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UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

Respondent, in its reply to the Petition for Certiorari, endeavors to make it appear that in one respect the issues involved a factual controversy and in the other respect that a fact finding by the Court below was "misread" by petitioner. A brief examination of the record demonstrates that respondent is grossly in error in both respects. Petitioner here does not and need not argue the facts. Every fact assumed in the Petition is well established and not controverted in the record. The "fact findings" upon which petitioner relies are not paraphrased or qualified in any manner. The petitioner argues from the literal phraseology of the fact findings and gives them the specific meaning intended by the Court below.

In an effort to escape from this Court's decision in *Crumady v. Joachim Hendrik Fisser*, 358 U. S. 423, 3 L. Ed. 2d 413 (1959), respondent states that petitioner cited no evidence to support the theory that the winch cut-offs were improperly set and, therefore, failed to prevent excessive strain (Resp. Brief, p. 4). But, the evidence demonstrates *without any controversion* whatever that while the electric winch for each vang was rated at 183 amps. (50 horsepower) (148a), nevertheless, the overload circuit breaker on each was set to trip at 275 amps. (148a-149a, 151a), and the overload relay in the controller was set to trip at 550 amps. (149a). Thus, the so-called "safety" devices, as they had been set, were wholly useless because this "safety" setting of the circuit breaker was far in excess of the admitted safe working load of the equipment. These devices were examined after the accident and, of course, revealed that neither had operated to cut off the power, despite the fact that the strain was irrefutably excessive to the point that the shackle actually shattered under it (151a). Thus, this case falls squarely under this Court's decision in *Crumady*.

Respondent argues also that the negligent use by the longshoremen of ship's equipment, which caused the dangerous condition aboard the vessel, did not render the vessel unseaworthy. Respondent's position on this is that the ship's officer who, admittedly, was supervising the entire operation, had no time to warn the longshoremen of the existence of the dangerous "tightline" condition since it happened so "suddenly" and was the result of the longshoremen's "momentary" mishandling of the equipment (Resp. Brief, p. 6).

Respondent obviously confuses "momentary" *mishandling* with "momentary" dangerous condition. The dangerous condition which resulted from the mishandling was the unseaworthiness which caused the accident, and lasted as long as was necessary to cause the shackle to break, killing decedent. It takes only a moment to place

a wrong hatch cover over a padeye (see *Grillea v. United States*, 232 F. 2d 919, 922-23 (2nd Cir. 1956)); or to place a ladder on an unsteady footing (see *Reid v. Quebec Paper Sales and Transportation Company*, 340 F. 2d 34, 35-36 (2nd Cir. 1965)). Indeed, most accidents occur from a "momentary" misstep, and the dangerous condition which results therefrom need only last sufficiently long to be the cause of the injury. Respondent's argument would have this Court place liability for unseaworthiness in the same position as liability for negligence.

Of the cases cited by petitioner, all of which fully support her position, respondent has singled out *Norfleet v. Isthmian Lines, Inc.*, 355 F. 2d 359 (2nd Cir. 1966), stating that, there, the court said that if injury resulted from negligent mishandling of a seaworthy appurtenance and "if the injury occurred *before* any unseaworthy condition arose", the shipowner would not be liable in an action based on unseaworthiness. Obviously, this is the law (stated as part of a discussion of the general proposition, and after emphasizing the law as we have stated it). But, clearly, that was not the circumstance in *Norfleet*, nor in the instant case. In *Norfleet*, the "tightline" condition occurred (rendering the vessel unseaworthy) and, then, the padeye broke, causing the injury. The court reversed the decision below, which had dismissed the case, and remanded the case for new trial on plaintiff's appeal. In the instant case, the "tightline" condition occurred and, thereupon, and as a result thereof, the shackle shattered. Thus, the injury occurred *after* and *as a direct result of* the "tightlining". Indeed, physically, the deadly vang line could have re-coiled only *after* both events, rendering the vessel unseaworthy, had occurred.

Significantly, respondent refrains from any reference to the decisions from the other circuits, precisely on the point and in direct conflict with the decision below on this specific issue.

In order to avoid the decision of this Court in *Boudoin v. Lykes Bros.*, 348 U. S. 336 (1955), respondent argues that petitioner had "misread" the specific finding by the District Judge that the longshoremen were not "*equal in disposition and seamanship to the ordinary men in the calling*" (Resp. Brief, p. 7). The bare fact is that *the court found just that, and in those words* (Conclusion No. 17; 236a). The language of the District Judge was clear, unequivocal and without doubt. Under that conclusion, as a matter of law, the vessel was unseaworthy under the *Boudoin* decision.

It is respectfully submitted that certiorari should be granted to review and reverse the decision of the Court below.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

MASCUILLI *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 274. Decided May 22, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96; *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423.

MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE WHITE are of the opinion that certiorari should be denied.